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Shaun Bowler

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## Essay

# When Is It OK to Limit Direct Democracy?

Shaun Bowler<sup>†</sup>

### INTRODUCTION

This Essay considers the question of the conditions under which it is acceptable for courts to place limits on the exercise of direct democracy, and says something about the kinds of limits that may be placed. In examining the question of when it is permissible for courts to limit direct democracy I make four main points.

The first point is that criticisms of direct democracy grounded in empirical patterns are often overstated. To date, the search for how to place limits on direct democracy has seemed to be ad hoc. Criticisms of the process are often grounded in empirical claims that are overstated.<sup>1</sup> This is not to say that direct democracy cannot—or should not—be restricted, just that the arguments advanced so far have not been terribly persuasive. Concerns about direct democracy seem to cycle around several common themes that focus on the competence of voters and their supposed inability to deal with the demands of direct democracy.<sup>2</sup> By and large these claims are neither terribly new nor terribly persuasive in their own right, but they are even less persuasive in providing a rationale for limiting the practice of direct democracy.

The second point concerns the role of representatives in relation to direct democracy. Not only is the yardstick of representative democracy a poor one against which to judge direct democracy, it is also important to note that elected representatives play a major—and far from positive—role in direct democ-

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<sup>†</sup> Professor, UC Riverside. I would like to thank the University of Minnesota Law School, the Law Review and members of the Law Review for hosting the conference, along with thanks to my fellow participants for comments and feedback. Copyright © 2013 by Shaun Bowler.

1. *See infra* Part I.

2. *See infra* Part I.

racy.<sup>3</sup> While attention has been focused on the initiative process it is important to see the initiative process in relation to the use of referenda at the state level. Introducing referenda into the discussion gives a fuller picture of direct democracy, one that shows the inter-relationship between politicians and direct democracy. Furthermore, many criticisms aimed at elections in direct democracy also apply to elections in representative democracy.<sup>4</sup> Critics of direct democracy, for example, often suggest that special interests play a large role in direct democracy elections,<sup>5</sup> but special interests are often held to influence candidates,<sup>6</sup> suggesting that if the criticisms of voting and voters justify limiting direct democracy elections, they also justify limiting elections in representative democracy. Clearly no one is seriously supportive of abandoning electoral democracy. What seems to be needed is a set of better justifications for limiting the exercise of direct democracy, preferably justifications that apply limits to both direct and representative democracy in sensible ways or allow for limitations to be specifically targeted towards direct democracy.

The third point considers the leading principled argument against direct democracy: the “republican form of government” component of the Guarantee Clause. Many argue that this clause provides a justifiable means to limit or even remove direct democracy processes from state constitutions.<sup>7</sup> But this line of argument, too, is not especially helpful in limiting direct democracy in general. Nor is it helpful in providing a basis for specific suggestions over what to limit; rather, it seems to be a general purpose tool that critics of direct democracy hope may be used to shut down processes of direct democracy altogether. Even if it were usable as a tool, it is, then, a particularly blunt one.

The fourth point elaborates how the idea of sovereignty provides a basis for limiting some aspects of direct democracy via the courts and, further, provides some quite specific guidance as to the form of those limits. While the idea of sovereignty may not provide the blanket ban that critics of direct democ-

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3. See *infra* Part II.

4. See *infra* notes 29–32 and accompanying text.

5. See, e.g., Elizabeth Garrett, *Who Directs Democracy?*, 4 U. CHI. L. SCH. ROUNDTABLE 17, 18 (1997).

6. See *infra* note 34 and accompanying text.

7. See, e.g., Catharine A. Rogers & David L. Faigman, “And to the Republic for Which It Stands”: *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1059 (1996).

racy hope to see, it would introduce some limits that would make the process either a little harder to use or easier to amend.

This Essay is structured in four parts that address each of those points in turn.

### I. THE MANY CRITICISMS OF DIRECT DEMOCRACY

Direct democracy is typically subject to many criticisms. As a consequence of these criticisms, there are many calls to reform the use of direct democracy.<sup>8</sup> Generally speaking, proposals for reform consist of measures intended to limit the initiative process in some way to make it harder to use or easier to amend or both. Calls for reform from politicians and commentators typically involve a measure of dislike of direct democracy and a determination to impose limitations.<sup>9</sup> Legislators are a fertile source of proposed reforms.<sup>10</sup> That is, we very rarely see legislators advocate lower signature thresholds or a longer period for qualification, either of which would help promote more frequent use of the process. Instead we see proposals to raise signature thresholds or ban paid signature gathering.<sup>11</sup> The National Conference of State Legislators (NCSL) 2002 report made thirty-four recommendations relating to direct democracy that ranged in scope from suggestions that voters be provided with a public information guide to the recommendation that states not adopt the initiative process at all.<sup>12</sup> These reforms and recommendations by NCSL and others are typically justified by appeal to the perceived shortcomings of the process that

8. See, e.g., Garrett, *supra* note 5, at 17–19; Rogers & Faigman, *supra* note 7, at 1071–72.

9. See *Lessons from California: The Perils of Extreme Democracy*, ECONOMIST, Apr. 23, 2011, at 11.

10. For example, Sen. Mark DeSaulnier (D-Concord) proposed prohibiting initiative measures that would have a net increase in government costs from being submitted to the voters unless the legislative analyst and state finance director agree the measures also provide new revenue that covers the costs. Patrick McGreevy, *Limit Costly Initiatives? Idea Falls Short in California Senate*, L.A. TIMES (Aug. 22, 2012, 9:10 AM), <http://latimesblogs.latimes.com/california-politics/2012/08/california-initiatives.html>; see also Anthony York, *State Democrats Consider Bill to Ban Initiatives from Primaries*, L.A. TIMES, Aug. 30, 2011, at A1.

11. See NAT'L CONFERENCE OF STATE LEGISLATURES, FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE 12, 39–43 (2002) [hereinafter NCSL 2002 REPORT], available at [http://www.ncsl.org/Documents/legismgt/irtaskfc/landR\\_Report.pdf](http://www.ncsl.org/Documents/legismgt/irtaskfc/landR_Report.pdf) (discussing legislative action related to signature requirements).

12. *Id. passim*.

are grounded in criticisms of how direct democracy works in practice.<sup>13</sup> That is, the “reforms” are often justified on the basis of empirical claims that provide criticisms of how direct democracy elections work.

Criticisms of direct democracy are, for example, often tied to the shortcomings of voters.<sup>14</sup> Voters, goes this line of criticism, are too easily baffled by the complexities of the issues, or too easily swayed by the TV ads of special interest groups or both to be able to make sensible choices over the alternatives on offer; alternatives that often owe more to interest groups pushing narrow interests than the public good.<sup>15</sup> The fact that opportunities for deliberation are limited in direct democracy means that these kinds of shortcomings cannot be mitigated, and if they are put into the constitution, they cannot easily be amended.<sup>16</sup> Policy outputs reflect these shortcomings and are likely to be short sighted, narrow minded, wrong headed or some combination of all three and, worse, lead step by step to something approaching a disaster. Typically drawing heavily on California experience, commentators paint a picture of ungovernability that is a direct consequence of direct democracy.<sup>17</sup>

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13. *Id.*

14. See, e.g., Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294.

15. See Garrett, *supra* note 5, at 18.

16. The ease with which initiatives may be amended varies by state. Shaun Bowler & Todd Donovan, *Measuring the Effect of Direct Democracy on State Policy: Not All Initiatives Are Created Equal*, 4 STATE POL. & POL'Y Q. 345, 348–49 (2004).

17. For representative examples of these criticisms of direct democracy see, for example, DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000); PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE* (1998); Chemerinsky, *supra* note 14; *California's Legislature, The Withering Branch*, THE ECONOMIST SPECIAL REPORT: DEMOCRACY IN CALIFORNIA, Apr. 23, 2011, at 10; Elizabeth Garrett & Matthew McCubbins, *The Dual Path Initiative Framework* (Univ. of S. Cal. Law Sch. Legal Studies, Working Paper No. 15, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1056&context=usclwps-lss>. These kinds of arguments may be bundled together with others that consider the link between direct and representative democracy in the attitudes and behaviours of voters. Some recent debates, for example, address whether the initiative helps support constructive or destructive attitudes in publics. One version of this argument is that a positive set of attitudes and behaviours (turnout, efficacy, and so on) are supported. Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 PARTY POL. 739 (2004); Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 64 J. POL. 892 (2002). A rival set of arguments suggest that these findings are overstated and that initiative use in particular generates mistrust in general,

The problem for this critique is that a sizeable body of empirical work shows that the critique is, at best, overstated and, at worst, wrong—especially when it comes to the issue of voter competence. This literature is too well established to require much rehashing in any great length. Essentially, a series of works have shown that voters, generally, do know what they are doing in the ballot booth.<sup>18</sup> In behavioral terms this means that voters use a mix of strategies to decide on how to cast a vote.<sup>19</sup> This might involve abstention or it might involve cue-taking of various forms (which actors back the proposal, who is targeted by the proposal) that help sort out which ballot issues.<sup>20</sup> But voters do not always need cues. Many proposals are quite straightforward. Decisions to extend the death penalty or forbid gay marriage, for example, are what Carmines and Stimson might term “easy” issues in the sense that people will typically have responses to these issues in part based on their own attitudes.<sup>21</sup> Other coping strategies include using the “how to vote” cards issued by parties.<sup>22</sup>

To be sure, there are examples of propositions that can readily be seen to generate confusion—especially when there may be conflicting measures on the same ballot. There are also

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Joshua J. Dyck, *Initiated Distrust: Direct Democracy and Trust in Government*, 37 AM. POL. RES. 539 (2009); Joshua J. Dyck & Edward T. Lascher, Jr., *Direct Democracy and Political Efficacy Reconsidered*, 31 POL. BEHAVIOR 401 (2009), or may mobilize public sentiment against a particular group, see generally Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730 (2013) (discussing the effect of direct democracy on minority rights).

18. See SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY 165–73 (2000); Arthur Lupia, *Dumber Than Chimps? An Assessment of Direct Democracy Voters*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 66, 66–70 (Larry J. Sabato et al. eds., 2001) [hereinafter Lupia, *Dumber Than Chimps?*]; Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994); Smith, *supra* note 17; Smith & Tolbert, *supra* note 17.

19. See generally BOWLER & DONOVAN, *supra* note 18; Lupia, *Dumber Than Chimps?*, *supra* note 18, at 66–70.

20. See generally Craig M. Burnett & Mathew D. McCubbins, *When Common Wisdom Is Neither Common Nor Wisdom: Exploring Voters' Limited Use of Endorsements on Three Ballot Measures*, 97 MINN. L. REV. 1557 (2013) (discussing ballot measures and voter cues).

21. EDWARD A. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 11–12 (1989).

22. See VOTER GUIDE SLATE CARDS, [http://www.voterguidesslatecards.com/PDFs/nov2012\\_dem.pdf](http://www.voterguidesslatecards.com/PDFs/nov2012_dem.pdf) (showing an example of a Democratic “how to vote card” for the 2012 election).

examples of proposals that are simply too dull to engage voters. Not surprisingly there is considerable roll-off on ballot votes.<sup>23</sup> Without recapping too much of these previous works one can simply say that too much can be made of how difficult voters find making decisions in ballot contests. While it is sensible to think more deeply about the kinds of processes that help facilitate voter decision making and provide the information voters need,<sup>24</sup> a large body of empirical work shows that voters can, by and large, align their votes on a measure with a perception of their own interests or ideologies.<sup>25</sup> Consequently, the impact of special interest TV spending is more muted than critics would suggest. The policy outcomes that result from direct democracy may not be the same outcome as preferred by commentators and policy experts, but they do seem to reflect what voters want.

## II. LEGISLATORS, LEGISLATURES, AND DIRECT DEMOCRACY

A second line of response to the criticisms of direct democracy considers more fully the role of representatives in direct democracy and the supposed virtues of representative democracy.<sup>26</sup> Critics of direct democracy often make comparisons between direct and representative democracy that cast direct democracy in a bad light, arguing that when citizens are legislators there is insufficient deliberation of the issues involved or too great a reliance on TV ads driven by sound bites that muddy rather than clarify the real issues at stake.<sup>27</sup> The implicit standard of comparison or benchmark is that of legislators: that is, there is insufficient deliberation relative to the level of deliberation in legislatures, or that the TV ads in direct democracy campaigns are significantly more misleading than in

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23. For the difficulties this may raise in terms of helping make sense of the voter's will, see Michael D. Gilbert, *Interpreting Initiatives*, 97 MINN. L. REV. 1621 (2013).

24. Burnett & McCubbins, *supra* note 20, at 1591–94.

25. See, e.g., BOWLER & DONOVAN, *supra* note 18, at 85–106 (discussing voters and private interests and citing recent studies that show direct democracy voters can turn individual preferences into votes on policy).

26. See, e.g., Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 577 (2001).

27. See Garrett, *supra* note 5, at 22, 33 (arguing that the public receives most of its information on initiatives through television and rarely engages in serious deliberation on the issues).

candidate elections.<sup>28</sup> But there are several reasons for thinking that comparison is not helpful.

Unfortunately, representatives are not always the ideal deliberators that critics of direct democracy suppose. Here, for example, is an account of the New York state legislature (New York is not an initiative state and so it is not a legislature whose behaviors are distorted by the initiative process in any way):

The lack of debate, deliberation, and review of legislation prior to a final vote has produced laws that include troubling errors or, in certain cases, laws that would not have been passed if they had received public or legislative scrutiny. These errors range from unnecessary grammatical and syntactical errors that may impair enforcement and judicial interpretation of such laws to massive financial expenditures that arguably do not benefit the people of New York.<sup>29</sup>

Such problems were not one-offs but seem to be persistent features of the New York legislature. In 2009, for example, a subsequent study of the New York legislature by Stengal et al., took as its title *Still Broken*.<sup>30</sup>

Similarly, concerns over the influence of money or of TV ads, not being willing to vote on the issues, or on minorities being targeted are all criticisms that are, have been, and will be repeatedly leveled at candidate elections. The example of Donovan's work in this symposium shows that direct democracy campaigns may mobilize negative affect towards out groups—in his work the example is that of affect towards gays.<sup>31</sup> But it is also likely that candidate campaigns focused, for example, on illegal or undocumented aliens would have similar effects. Continuing with our example of New York—again a state untainted by the initiative process and therefore in a position to be an exemplar for representative democracy—the Citizen's Union reports that, "[o]ne of every 11 [NY] state legislators, or 17 of 185, who have left office since 1999 have done so because of ethical misconduct or criminal charges."<sup>32</sup>

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28. *Id.* at 29.

29. JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUSTICE, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM 47 (2004), *available at* [http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform\\_finalreport.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/albanyreform_finalreport.pdf).

30. ANDREW STENGEL ET AL., BRENNAN CTR. FOR JUSTICE, STILL BROKEN: NEW YORK STATE LEGISLATIVE REFORM, *available at* <http://www.brennancenter.org/sites/default/files/legacy/publications/Still.Broken.pdf>.

31. Donovan, *supra* note 17, at 1754–59.

32. CITIZENS UNION OF THE CITY OF N.Y., EXAMINING THE TURNOVER IN THE NEW YORK STATE LEGISLATURE: 2009–2010 UPDATE 1 (2011), *available at*



Legislatures do not fall short on the grounds of deliberation alone. Other concerns relating to legislatures include worries over the role of money in legislative politics and in legislative elections, the role of special interests, negative campaigns, and the exaggerated influence of the more ideologically extreme via primary elections.<sup>33</sup> Indeed whole swathes of the discipline of political science either assume or examine the degree to which special interest money sways legislators, and the ways in which they fail to represent groups or pay too much attention to the loudest groups.<sup>34</sup>

That is, the very same kinds of criticisms we see leveled at direct democracy can be, and are repeatedly, leveled at representative democracy. In fact, at times, political science as a discipline comprises a catalogue of the pathologies of representative democracy in studies on shirking, corruption, polarization, and rent seeking. As Sirico notes in his study of restrictions on the initiative process, “[q]ualities such as the deliberative and representative nature of government generally describe matters of degree rather than of kind. As distinguishing standards, such qualities prove unhelpful when attempting to define the general character of government.”<sup>35</sup>

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[http://www.citizensunion.org/www/cu/site/hosting/Reports/CU\\_ExaminingTurnover\\_Update\\_Feb2011.pdf](http://www.citizensunion.org/www/cu/site/hosting/Reports/CU_ExaminingTurnover_Update_Feb2011.pdf).

33. See, e.g., Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1243 (2008) (documenting the pervasive influence of special interest groups in judicial campaigns); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 237 (1991) (arguing that without government intervention, elections can go to the highest bidder); Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 889 (2008) (stating that a great deal of campaign advertisement is false and misleads voters).

34. Extreme examples of political failure of representative democracy can be seen in European governments, where a succession of short term financial decisions made by elected representatives—notably in Greece and Italy—led to a series of troubles. Niki Kitsantonis, *Greek Leaders Fail to Reach Consensus on Austerity*, N.Y. TIMES, May 27, 2011, at B5; Graham Bowley et al., *Italy Pushed Closer to Financial Brink*, N.Y. TIMES (Nov. 9, 2011), <http://www.nytimes.com/2011/11/10/business/global/italy-pushed-closer-to-financial-brink.html?pagewanted=all&gwh=299BCD417AD2C1E018A90EF423C8A047>.

Elected politicians were not trusted to solve the problems they created which led to greater reliance on technocrats, i.e. non-democratic solutions. The United States seems quite far away from those sorts of solutions, although the bankruptcy of a number of local and city governments does suggest that there may be small-scale analogies.

35. Louis J. Siroco, Jr., *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 632, 652 (1980).

It would seem that—since elections of any kind are subject to failings related to the role of money, special interests, or lack of deliberation—the criticisms of direct democracy elections provide a justification for limiting all kinds of elections. If voters are not trusted to vote “properly” on the issues of abortion, gay rights, death penalty, or taxes directly, are they also not trusted to vote “properly” on the candidates who will legislate these issues? The answer to this hypothetical question should be “no.” Survey evidence suggests that despite its flaws or perceived flaws, voter support for the initiative process remains strong.<sup>36</sup>

Stepping back a little from the pushing and shoving implied by a framing of representative democracy versus direct democracy, we see that in many ways the distinction between the two processes is somewhat artificial.

A potential criticism of direct democracy may be that it focuses quite heavily on the initiative, but even in the initiative process, politicians often take a prominent role.<sup>37</sup> Often, this role can involve promoting, supporting, and encouraging discriminatory legislation.<sup>38</sup> The point is that even initiative ballot

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36. See, e.g., Mark Baldassare et al., *California's Initiative Process: 100 Years Old*, PUB. POL'Y INST. CAL. 1, 2 (Sept. 2011), [http://www.ppic.org/content/pubs/jtff/JTF\\_InitiativeJTF.pdf](http://www.ppic.org/content/pubs/jtff/JTF_InitiativeJTF.pdf) (reporting that sixty-two percent of California voters think decisions made through the initiative process are “probably better . . . than public policy decisions made by the governor and state legislature”). A striking feature of survey work on direct democracy is that the polling tends to gravitate towards plumbing voters' concerns about direct democracy, such as whether there are too many proposals or too much money being spent. See, e.g., MARK BALDASSARE & CHERYL KATZ, *THE COMING AGE OF DIRECT DEMOCRACY* 167–68 (2008). The end result is a puzzling one: voters may list many flaws but still like the process. Such an irrational combination, where voters dislike everything about the process and still like the process, might justify limited direct democracy. Unfortunately, polling on attitudes about the process of voting may not examine voter attitudes about representative democracy as an institution. If voters were asked nontraditional polling questions, such as whether they think legislators care more about being re-elected than they care about ordinary citizens, it is conceivable that for all the flaws of direct democracy, voters see representative democracy as even more flawed. It is hard, then, to put evaluations of direct democracy against a proper context of attitudes towards democratic processes more generally.

37. Smith & Tolbert, *supra* note 7, at 741 (noting that the potential to increase voter turnout, use a ballot issue against an opposing party, and ideological compatibility between party platform and ballot measure are “three motivating factors why major [political] parties are becoming more involved in the initiative process”).

38. Former governor Pete Wilson's use of Proposition 187, aimed at curbing illegal immigration to spur his re-election campaign in 1994 is a notable

propositions may be strongly influenced by representatives. This point is underscored when we consider referenda. Legislative referenda are measures placed on the ballot by state legislatures<sup>39</sup>—by far the most common type of direct democracy in the American states.<sup>40</sup> They are more frequent than initiatives,<sup>41</sup> they are more likely to change the constitution than initiatives,<sup>42</sup> and they pass at higher rates.<sup>43</sup> Although referenda have received surprisingly little scholarly attention, they are both numerous and consequential. For example, between 1990 and 2008 referenda outnumbered initiatives by approximately two to one (1768 to 751) and were, of course, used in a larger number of states than the initiative.<sup>44</sup> In the 2012 election this pattern continued: across 38 states there were approximately 174 issues put to voters, 115 of which were legislative referen-

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example. See Dale Mahardige, *The Sleeping Giant Awakes*, MOTHER JONES, Feb. 1998, at 56, available at <http://www.motherjones.com/politics/1998/01/sleeping-giant-awakes> (“Using Proposition 187 to help his re-election campaign in 1994 and Proposition 209 in his doomed presidential bid two years ago, Wilson has actively courted the white voter base . . .”); Susan Davis, *Shades of Prop 187? Pete Wilson Cuts Immigration Ad for Whitman*, WSJ BLOG (May 11, 2010, 4:27 PM), <http://blogs.wsj.com/washwire/2010/05/11/shades-of-prop-187-pete-wilson-cuts-immigration-ad-for-whitman/> (“Wilson was re-elected governor of California in 1994 by making his support of Proposition 187—aimed at barring illegal immigrants from using California social services—a centerpiece of his campaign.”).

39. See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 694 (2010) (defining referenda “to be statutes or constitutional amendments that a representative body refers to the citizens for approval or rejection”); *Initiative, Referendum and Recall*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/initiative-referendum-and-recall-overview.aspx> (last visited Apr. 4, 2013) (“There are two primary types of referenda: the legislative referendum, whereby the Legislature refers a measure to the voters for their approval, and the popular referendum, a measure that appears on the ballot as a result of a voter petition drive.”).

40. TODD DONOVAN ET AL., STATE AND LOCAL POLITICS: INSTITUTIONS AND REFORM 117 (3d ed. 2012).

41. See RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 137–38 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

42. See *id.*

43. RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 4 (2002).

44. *Ballot Measures Database*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-database.aspx> (last visited Apr. 4, 2013) (select “all states,” “any topic area,” years 1990 through 2008, “any” election type, and “initiative” under measure type and submit query, then repeat using “legislative referendum” instead of “initiative”).

da.<sup>45</sup> While some referenda may be constitutionally mandated,<sup>46</sup> some of the referenda reflect deliberate choices by politicians seeking to change a constitution and commit future generations to a particular policy on taxes or social issues.<sup>47</sup> Professors Cain and Noll raise concerns about the hypermalleability of constitutions that put in place constraints and restrictions that subsequently lead to inflexibility.<sup>48</sup> Too many constitutional amendments are, in their view, a bad thing. A large part of the problem they identify is due to changes introduced by initiative process and many of the examples they discuss, such as term limits in California,<sup>49</sup> are taken from the initiative process. That said, even Cain and Noll acknowledge that “[n]inety percent of amendments are proposed by legislatures,”<sup>50</sup> and yet, it is often the initiative process that bears the brunt of criticism of many commentators. Yet the referendum process sees a series of proposals put on the ballot by legislators by choice, often intended at constitutional change to lock in their policy preferences, some of which seem aimed at ideological rivals or minorities or both.<sup>51</sup> Recent examples include attempts by legislators to challenge the Affordable Care Act,<sup>52</sup> Oklahoma’s legislatively referred Question 755 that sought to outlaw the use of Sharia in Oklahoma state courts,<sup>53</sup> Oklahoma’s legislatively referred Question 751 on the same ballot that sought to make English

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45. 2012 *Ballot Measures: Election Results*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/ballot-measures-2012-homepage.aspx> (last visited Apr. 4, 2013).

46. See RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW, *supra* note 41, at 137.

47. Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1521–22 (2009).

48. *Id.* at 1520 (“The emerging pattern of hyperamendability combined with infrequent revision has significant political consequences.”).

49. *Id.* at 1524.

50. *Id.* at 1520.

51. See, e.g., Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POLS. 154, 172–74 (2002).

52. See generally *State Legislation and Actions Challenging Certain Health Reforms*, Nat’l Conference of State Legislatures, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-laws-and-actions-challenging-ppaca.aspx> (last updated Jan. 2013) (documenting the legislative action of twenty states to proscribe elements of the Patient Protection and Affordable Care Act).

53. H.R.J. Res. 1056, State Question No. 755, Legis. Referendum No. 355, 52d Leg., 2d Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>.

the official language,<sup>54</sup> North Carolina's (anti) same-sex marriage referendum in May 2012,<sup>55</sup> and Minnesota's same-sex marriage referendum in November 2012.<sup>56</sup>

These examples of the heavy involvement of representatives in direct democracy processes support two observations. First, a focus on the initiative process alone is a misleading guide to direct democracy in the United States because legislators can indirectly use the initiative process via the referendum process. Second, blaming the initiative process for pathologies of direct democracy, and not the extent that politicians are involved in the process, seems at best misguided and at worst unfair. Some of the supposed pathologies of direct democracy should be laid squarely at the doorstep of politicians themselves. Garrett's term of "hybrid" democracy aptly suggests there is room for a great deal of overlap between direct and representative processes.<sup>57</sup> "Reforming" direct democracy and giving more power to politicians while taking it away from voters based on the failings of special interest politics and the role of money or misleading advertising would seem to be a case of blaming the victim for displaying exactly the same traits as the perpetrator.

Overall these points relating to the legislature do not offer much of a rationale for limiting *just* direct democracy, but—on the grounds of consistency—must surely offer a rationale for limiting representative democracy as well. What critics of di-

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54. H.R.J. Res. 1042, State Question No. 751, Legis. Referendum No. 351, 52d Leg., 2d Sess. (Okla. 2009), *available at* <https://www.sos.ok.gov/documents/questions/751.pdf>.

55. S.B. 514, 2011 Sess. (N.C. 2011), *available at* <http://www.ncleg.net/Sessions/2011/Bills/Senate/HTML/S514v3.html>.

56. S.F. 1308, 87th Leg. (Minn. 2011), *available at* <https://www.revisor.mn.gov/bills/bill.php?b=senate&f=SF1308&ssn=0&y=2011>. To be sure, within the literature on the initiative process there is debate over the extent to which the pure majority rule of the initiative adversely impacts minority rights. Hajnal et al., *supra* note 51, at 172–74 (addressing the consequences of direct democracy on racial and ethnic minorities); *see also* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 261 (1997) ("Citizens in the political majority have repeatedly used direct democracy to put the rights of political minorities to a popular vote."); Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 312 (2007) (evaluating data on the impact of direct democracy on gay and lesbian civil rights). As the examples of legislative referenda show, however, anti-minority legislation is not unique to the initiative process.

57. *See generally* Elizabeth Garrett, *Campaign Finance in the Hybrid Realm of Recall Elections*, 97 MINN. L. REV. 1654 (2013) (considering how blurred the line between direct and representative democracy may become).

rect democracy need are a set of criticisms that lead to a justification for only or primarily limiting direct democracy or limiting some of the worst features of both. The idea of a “republican form of government” provides the silver bullet that can stop direct democracy.

### III. A “REPUBLICAN FORM OF GOVERNMENT” AS A PRINCIPLED OBJECTION TO DIRECT DEMOCRACY

Part of the weakness of the criticisms of direct democracy, and why the criticisms spill over so freely into a critique of representative democracy, is that they tend to be grounded in empirical or practical failings rather than failings of principle. In a rush to criticize direct democracy elections and direct democracy electorates, critics also end up criticizing elections and electorates more generally. Plainly, no one wishes to see the end of electoral democracy. What critics need is an argument that applies solely, or at least mostly, to direct democracy. The single subject rule provides some basis for limiting specific proposals by the action of the courts.<sup>58</sup> But relying on such a rule introduces a level of idiosyncrasy in what it may apply to, and hence narrows the scope of specific proposals but does not speak to the process more generally. What critics of direct democracy seek is a wider-ranging principle that will allow for far greater restrictions on direct democracy. An example of an argument like this might cite the Guarantee Clause,<sup>59</sup> in effect using the term “republican form of government” as a synonym for “only a representative form of government.”

To be sure, the use of the Guarantee Clause to shut down direct democracy is not a new idea. It was an argument used in the first major challenge to the constitutionality of the initiative process in the Supreme Court case, *Pacific States Telephone and Telegraph Co. v. Oregon*.<sup>60</sup> But in that decision the

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58. See Gilbert, *supra* note 23, at 1637–38 (“[M]ost states have a ‘single subject rule’ which is designed to limit initiatives to a single issue.”); Michael D. Gilbert, *Does Law Matter? Theory and Evidence from Single-Subject Adjudication*, 40 J. LEGAL STUD. 333, 339 (2011) (explaining that judges use the single subject rule to prevent provisions from becoming law with only minority support).

59. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

60. 223 U.S. 118, 137 (1912) (“[T]he single contention [is] that the creation by a state of the power to legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of article 4 of the Constitution . . .”).

Court declined to define the term “republican form of government” itself, arguing that the definition was of a political character and, hence, beyond the jurisdiction of the courts.<sup>61</sup> The Court’s decision, however, has not stopped critics such as Chemerinsky<sup>62</sup> and Engberg<sup>63</sup> from suggesting that the Guarantee Clause is a way to limit direct democracy in wide-ranging ways.<sup>64</sup>

It is important to underscore that criticism grounded in the Guarantee Clause is potentially a very powerful argument. In contrast to the criticisms based on claims over the empirical workings of direct democracy which often seem ad hoc, this is one grounded in constitutional principle.<sup>65</sup> Furthermore, in contrast to the criticisms that apply to both direct and representative democracy, criticisms based on the Guarantee Clause will apply solely to direct democracy. It is thus an argument that on

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61. *Id.* at 149–50 (“It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction which the doctrine just stated points out between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper cases to enforce the Constitution.”). For a more extensive review of the case, see Thomas C. Berg, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 211 (1987); see also Timothy M. Tymkovich, *Are State Constitutions Constitutional?*, 97 MINN. L. REV. 1804, 1812 (2013) (discussing justiciability and the Guarantee Clause).

62. See Chemerinsky, *supra* note 14, at 301 (“My most dramatic argument is that the initiative process should be declared unconstitutional because it violates [Article 4, § 4 of the Constitution].”).

63. See Engberg, *supra* note 26, at 589 (discussing whether the Guarantee Clause also protects state initiative lawmaking and opining “[w]hile it is unclear how much protection the Guarantee Clause provides states against federal intervention, the amount is probably not negligible”).

64. See Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 969 (2005) (“[W]ith the increasing use of initiatives to change policy and reform constitutions, further constraints may be placed on legislative activity. Indeed, as direct democracy ties up the legislatures, we may begin to run afoul of Article 4, § 4 of the Constitution, which guarantees every state a republican form of government.”); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 43 (1993) (“When an initiative amendment includes affirmative legislation, the legislature and the state courts might as well not exist. [Judicial opinion] does not save such initiatives, regardless of subject, from the Guaranty Clause.”); Tymkovich, *supra* note 61, at 1815 (“[T]he initiative and referendum process itself may not be enough to implicate the [Guarantee] Clause, but when the results of the process reach a certain degree of deviation from republican norms, they may become subject to the limits of the Clause.”).

65. See Chemerinsky, *supra* note 14, at 301; Engberg, *supra* note 26, at 589.

the face of it needs taking seriously and one that cannot be rebutted by empirical findings. It is not, however, an argument that is entirely persuasive. This is the case for several reasons. In a practical sense, the Court has ruled that the form of government is a political question, beyond the scope of the Court's jurisdiction.<sup>66</sup> Unless the Court overturns itself on this ruling, the arguments of Chemerinsky and others are moot.<sup>67</sup> But more than that, such arguments are mistaken because there exists considerable room for disagreement over the degree to which a "republican form of government" is inconsistent with direct democracy.<sup>68</sup>

It does seem clear that common usage of the term does not support the idea that "republican" is a synonym for "purely representative." This is the case whether we look at usage in the eighteenth century or today. For example, the sixth edition of Dr. Samuel Johnson's 1766 dictionary—a dictionary of the English language contemporary to the American revolutionary period—defined "Republican" as an adjective to mean "Placing the government in the people," and a noun meaning, "One who thinks a commonwealth without monarchy the best government."<sup>69</sup> "Republick" was defined as a "state in which the power is lodged in more than one" and "Common interest: the publick."<sup>70</sup> The current Oxford English Dictionary defines "republic" as "A state in which power rests with the people or their representatives; spec. a state without a monarchy."<sup>71</sup> In the

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66. See *Pacific States*, 223 U.S. at 150.

67. Engberg takes the different tack of accepting that the task of restricting the initiative does fall to Congress and uses the Guarantee Clause to argue that Congress does indeed have the right to do so. See Engberg, *supra* note 26, at 585 (arguing that the Court should defer to Congress's "superior ability to make legislative findings," and hold that "Congress would not violate horizontal separation of powers by legislating under the Guarantee Clause," because the Court has "not yet fully enforced [the Guarantee Clause]").

68. For an extended discussion of the problems, see generally Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994) (discussing how disagreements about the meaning of a "Republican Government," termed "the denominator problem," contributed to the historical developments surrounding the nation's Founding, Antebellum, and Civil War eras).

69. SAMUEL JOHNSON, *Republick Definition*, in A DICTIONARY OF THE ENGLISH LANGUAGE 501 (photo. reprint 2008) (6th ed. 1766), available at <http://www.archive.org/stream/dictionaryofengl102johnuoft#page/n499/mode/2up> (last visited Apr. 4, 2013).

70. *Id.*; see also Amar, *supra* note 68, at 752–60 (comparing modern interpretations of the "concept of Republican Government").

71. *Republic Definition*, OXFORD ENGLISH DICTIONARY ONLINE (Dec.



current period the definition has shifted a little to include representatives, but not as the sole component of the definition. Plain English language usage, then, does not support the idea that a republican form of government is one in which direct democracy is forbidden.

But there are other troubling issues in seeking to anchor an objection to direct democracy in some version of the intent of the Framers. This is partly because any plausible interpretation of their intended definition of “representative” embraces some features that are now widely regarded as illegitimate. The central questions of who is being represented and how contentious issues and such questions are resolved are inherent in any use of the term “representation,”<sup>72</sup> even within United States constitutional practice. Even at as late a date as the *Pacific States* decision in 1912, for example, women and minorities were completely disenfranchised.<sup>73</sup> It would seem unlikely that those who argue that a republican or representative form of government in the states means the end of direct democracy would also argue that only white males should be allowed to stand and vote in state elections.<sup>74</sup> But even if we exclude the more obvious demographic objections to a definition of “republican” as “representative as meant by the Founders” then the degree of flexibility in the term representative is striking. Throughout U.S. political history, the manner in which elections to choose representatives are conducted and to whom representatives are accountable have all varied markedly.<sup>75</sup> This variation not only occurred over time but also occurs over place.<sup>76</sup> There is an astonishing variety of democratic practice in the United States. In the current period this variation embraces practices that include multi-member districts,<sup>77</sup> New

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2012), <http://www.oed.com/view/Entry/163158?redirectedFrom=republic&>.

72. See generally A.H. BIRCH, REPRESENTATION 13–18 (Leonard Schapiro & Peter Calvert eds., 1971) (discussing the meaning of “representation”); Amar, *supra* note 68, at 766–73 (discussing how geography and demography are two factors that contributed to the understanding of republican government during the “Founding Era”).

73. SOCIAL DEVELOPMENT, SOCIAL INEQUALITIES, AND SOCIAL JUSTICE 8 (Cecilia Wainryb et al. eds., 2008).

74. Amar discusses these issues in terms of a “denominator problem.” Amar, *supra* note 68, at 766–73.

75. Joshua J. Scott, *Elections, Local and State*, in *ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS* 129 (Larry Sabato & Howard R. Ernst eds., 2006).

76. *Id.*

77. See THE CONSTITUTIONALISM OF AMERICAN STATES 58 (George E.

England Town Hall meetings,<sup>78</sup> and wide differences over voter identification laws, voter competence laws, voter registration laws, and felon (dis)enfranchisement, as well as wide variation in laws governing participation in primaries.<sup>79</sup> Given this huge variation in the practice of representation, it is hard to see how one can use the term “representative form of government” to capture an ideal type of democratic practice in any concise way let alone as a useful benchmark against which to judge direct democracy. Even the brief list of the varieties of representative democracy practiced in the United States suggests that there are problems in using “representative” as an analytical benchmark in order to judge direct democracy: do we measure direct democracy against a New England Town Hall Meeting or against majority/minority districts that help ensure the ethnicity of the winner?

Finally, even if we allow for a “technical” or possibly idiosyncratic use of the term, it is still not clear whether *any* and *all* expression of the initiative or *any* and *all* voice for voters (e.g., in ratifying constitutional changes) is at odds with republican government since they are not expressly forbidden. That is, even if one argues that English language usage of the term “republican” is not appropriate but that in a technical sense it can indeed be used as a synonym for “representative” in some kind of original intent reading, and even if one argues, further, that there are definitions of “representative” that somehow accommodate both modern practices and original intentions, then it is still not the case that direct democracy is expressly forbidden. Standard practice in the United States suggests that the default is that if a practice is not forbidden it is allowed.

Amar goes further in arguing not just that the term “republican form” does not mean banning direct democracy, but that a proper reading of the term in effect guarantees direct democracy.<sup>80</sup> In his discussion of republican government, Amar

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Connor & Christopher W. Hammond eds., 2008).

78. *Id.*

79. See generally Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CTR. FOR JUSTICE (2011), [http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan\\_Voting\\_Law\\_V10.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf). Oddly, the Town Hall Meeting system—an authentic American tradition of popular involvement which would seem to have some overlap with the initiative process certainly in spirit—does not seem to attract the same degree of criticism as the initiative process. In fact it does not seem to attract any criticism at all.

80. See Amar, *supra* note 68, at 763–66.

develops an understanding of the theme of who are “the People” and what is their proper role.<sup>81</sup> Along the way he notes that the phrases from Madison—whose definition seems to be *the* most important definition of “republic” returned to in this discussion<sup>82</sup>—have become more central in retrospect than at the time.<sup>83</sup> Amar believes that there is, in fact, a settled definition of “republican government” within the context of the founding of the U.S. Constitution that implies popular sovereignty:

Republican Government did have a central meaning at the Founding and for a century thereafter. Many current theories of Republican Government sidestep this central meaning; and one theory—a strong form of the Anti-Direct Democracy Thesis—comes close, at least rhetorically, to betraying the central meaning. The central meaning of Republican Government revolved tightly around popular sovereignty, majority rule, and the people’s right to alter or abolish.<sup>84</sup>

Repeated references to “the People” in United States and state constitutional and legal practice make it plain that it is not elected representatives who are sovereign—it is “the People”—however defined. Amar’s argument is one that leaves little room for those who wish to use “republican form of government” as a means to quash direct democracy.

Ultimately, it is important to recognize that playing the “republican form of government” card does not allow for the elimination of direct democracy. Nor does a reading of the Guarantee Clause seem to provide any sure or concrete guide to the ways in which we might restrict direct democracy short of banning it outright. But the reminder of the idea of sovereignty

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81. *See id.* at 750–51.

82. *See id.* at 756–59. Indeed, in a non-legal sense, it seems that the whole debate over whether the initiative is consistent with a republican form of government consists of parsing Madison’s usage and arguing that it only really amounts to one of the components identified in the OED definition. In other words, it really only means representative government but he chose not to use that word. *See* discussion *supra* Part III. That may be the case, but in historical context one would think that at the time there were some concerns over backsliding into monarchy via the backdoor of states if Loyalists could organize. It would seem then that the “no monarch” component of the term was in mind at the time. Furthermore, in terms of historical uses to the word of which Madison was well aware, the Roman Republic was—like the United States at the time—a republican form of government which allowed slavery.

83. Amar, *supra* note 68, at 756 (“Though [Madison’s Federalist] Number 10 is now canonical, its role at the Founding and for the next century was far more modest.”).

84. *Id.* at 786; *see also* Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 227–31 (1987) (discussing the farmers’ vision of republicanism, with “popular rule as its fundamental principle”).

may lead to a way forward. We can see this by reference to British discussions on sovereignty.

#### IV. SOVEREIGNTY AS A GUIDE TO LIMITING DIRECT DEMOCRACY

In some ways the British constitutional example of Parliamentary sovereignty is a difficult one to bring to bear on a discussion of direct democracy in the United States. In the United Kingdom, constitutional practice is embedded within an “unwritten” constitution.<sup>85</sup> Further, within the United Kingdom it is Parliament that is sovereign, not the people.<sup>86</sup> There are key elements of the British definition of sovereignty that make it an unlikely or unreasonable guide for the United States experience at the state level. But British experience is both historically relevant and also practically relevant in the sense that it provides a record of an extant and extensive debate over what sovereignty means, specifically whether sovereignty may be located in the people or in parliament.

As with any constitutional construct, there are debates over the concept of sovereignty.<sup>87</sup> The idea of sovereignty can be troublesome since there is an inherent tension between having a sovereign who has a large degree of power and imposing limits on the exercise of that power. Discussions in the United Kingdom, for example, consider a series of de facto limits on parliamentary sovereignty imposed by a series of political decisions.<sup>88</sup> In the United Kingdom, the setting up of sub-national governments in Scotland and Wales and other changes including European Union membership may even challenge the idea of sovereignty itself.<sup>89</sup> There are also discussions over the ex-

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85. See JEFFERY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES 16 (2010).

86. *Id.* at 106.

87. See, e.g., *id.* at 113 (discussing parliamentary sovereignty and criticizing the theory of “common law constitutionalism,” which holds that Parliament is not sovereign because its authority is subordinate to common law); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that “no government entity can enjoy plenary ‘sovereign’ immunity from a suit alleging a violation of constitutional right”); Stuart Lakin, *Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution*, 28 OXFORD J. LEGAL STUD. 709 (2008) (arguing that the idea of Parliamentary sovereignty is misconceived).

88. See, e.g., GOLDSWORTHY, *supra* note 85, at 105–37.

89. See Mark Elliott, *Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention*, 22 LEGAL STUD. 340, 353 (2002) (arguing that while devolution is consistent with the

tent to which legal authority may limit parliamentary sovereignty.<sup>90</sup>

Australian or Canadian versions of parliamentary sovereignty may offer more directly comparable examples to the United States case since both their parliaments exercise sovereignty within limits imposed by both federalism and a written constitution.<sup>91</sup> Fundamental rights, for example, are typically put beyond the reach of whatever sovereign is in place (Parliament, the people).<sup>92</sup> In the United States, this means that courts already play a role in ruling some popular initiatives unconstitutional.<sup>93</sup> If anything, these limits suggest that an existing de facto limit of direct democracy is that it cannot be used to deny rights, but may be used to extend them. In this Essay, I take those types of limits on direct democracy as given. That is, there will be judicial review of initiatives with respect to basic rights.<sup>94</sup>

Putting to one side these concerns, and the many and important differences between the United Kingdom and United States settings, key components of the definition of sovereignty in the United Kingdom setting are helpful in identifying tests that may help discuss limits on direct democracy.

In the United Kingdom, sovereignty is taken to mean that Parliament can make and unmake any law, meaning that Parliament cannot bind its successor.<sup>95</sup> This definition means that

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theory of Parliamentary sovereignty, it creates practical challenges); cf. N.W. Barber, *The Afterlife of Parliamentary Sovereignty*, 9 INT'L J. CONST. L. 144, 149 (2011) (discussing the implication of the European Communities Act of 1972 on Parliamentary sovereignty).

90. See generally JEFFERY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* (1999) (tracing the development of Parliament's authority and discussing the relation of judges, common law, and statute law).

91. Discussions of sovereignty in the United States often seem to consider the role and powers of the states within the federal system. See, e.g., John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 27–28 (1998) (commenting on state sovereignty being subject to judicial review). A related discussion is that of the idea of state sovereign immunity. See, e.g., Calvin R. Massey, *State Sovereign Immunity and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65–66 (1989).

92. See GOLDSWORTHY, *supra* note 90, at 14.

93. See, e.g., *supra* note 60 and accompanying text.

94. See, e.g., Diarmuid Rossa Phelan, *Natural Law and Popular Sovereignty: The Irish Legal Order*, 86 STUD.: IRISH Q. REV. 215, 217–18 (1997) (discussing limits imposed by natural law in Ireland, where the parliamentary system, while not a federal system, works within the framework of a written constitution).

95. See *Parliamentary Sovereignty*, UK PARLIAMENT, <http://www>

there is, in effect, an inter-generational constitutional contract in which future generations are not only not bound by the current generation, but that the current generation should not put in place binding constraints on future generations.<sup>96</sup> This quite simple idea has a number of straightforward consequences in terms of constitutional practices that apply quite directly to the direct democracy settings where one generation of voters is limited in how it may bind the current generation.

One clear example of a category of proposals that would be ruled out on the basis of sovereignty are those proposals that require more votes to amend or overturn the proposal than it took to pass the proposal in the first place. Tax relief proposals, to take a concrete example, are sometimes passed with simple majorities but may require a supermajority to be overturned.<sup>97</sup> The concept of sovereignty would suggest that such efforts are improper attempts by the current generation to bind future generations. That is, under the doctrine of sovereignty, proposals passed by the initiative should be as easy to amend as they are to pass in the first place in order to avoid binding the hands of successor generations.

A second area in which limitations may be imposed comes when we consider attempts to change constitutions by direct democracy. A common tactic among United States politicians is to try to use constitutional amendments to, as Cain and Noll put it, “lock in . . . temporary advantage[s].”<sup>98</sup> For example, Republicans, in contrast to Democrats, may prefer tax decreases or limitations on tax increases. Placing restrictions on tax increases in the constitution—such as requiring a super-majority vote for tax increases to pass—makes it much harder for Democrats to subsequently try and raise taxes. But the tactic is not limited to taxation. Placing restrictions on availability of abortion or gay marriage within the constitution will also make change much harder to accomplish. Such attempts plainly limit the ability of future generations to make or unmake any law. Indeed, that is the purpose of such restrictions. These restrictions thus limit sovereignty whether passed by legislators or by voters and as such deserve judicial scrutiny. One possibil-

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.parliament.uk/about/how/sovereignty/ (last visited Apr. 4, 2013) (“Generally, the courts cannot overrule [Parliament’s] legislation and no Parliament can pass laws that future Parliaments cannot change.”).

96. *Id.*

97. Cain & Noll, *supra* note 47, at 1543.

98. *Id.* at 1521.

ity is to make attempts to bind future generations more arduous. Attempts to amend the constitution could and, in light of concerns over sovereignty, should be held to a much higher set of thresholds and barriers than those attempting to introduce a simple statute. On those grounds it would be reasonable to require many more signatures to qualify constitutional measures than to qualify measures that propose statutes. It would also be reasonable to require that changes to the constitution meet higher vote totals than statutory measures—possibly even supermajorities or voting on two ballots—in order to be enacted.<sup>99</sup>

In contrast to the wish of many who advocate for the abolition of direct democracy—possibly through application of the Guarantee Clause<sup>100</sup>—the restrictions proposed here may seem quite modest. As modest as they may be, an argument grounded in the doctrine of sovereignty involves process based tests and not outcome based ones.<sup>101</sup> As such, and as modest as the restrictions may be that are proposed here, they may be restrictions subject to judicial decision. Judges are understandably reluctant to overturn the voice of the people when they have decided a particular outcome.<sup>102</sup> This alone would suggest some hesitation by the courts in deciding that many aspects of direct democracy are justiciable even without the precedent of *Pacific States*. By contrast, ruling on matters such as vote requirements would be judgments on process and not judgments on outcomes produced by the expression of popular will. These would be more feasibly justiciable kinds of rulings than ones on outcomes. The doctrine of sovereignty, then, not only provides some specific guidance on what kinds of limits may be placed on direct democracy, it also allows for court rulings on those limits. On that basis alone, an argument grounded in the idea of sovereignty provides a more useful tool than one grounded in the Guarantee Clause.

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99. Both the example of restricting constitutional amendment by direct democracy and the example of embedding in hard to overturn votes are examples included in the NCSL list of recommendations. See NCSL 2002 REPORT, *supra* note 11, at 37, 58.

100. See discussion *supra* Part III.

101. Elizabeth Beaumont, Panel Discussion at the University of Minnesota Law Review Symposium: A More Perfect Union? Democracy in the Age of Ballot Initiatives (Oct. 26, 2012).

102. See Gilbert, *supra* note 23, at 1632–1644 (discussing issues surrounding identifying voter intent and majority will).

## V. DISCUSSION

The end result—the answer to the question of “when is it OK to limit direct democracy?”—is more or less “hardly ever,” and then only on procedural grounds. As an answer it is, perhaps, something of a let down. It is not something that would satisfy critics of direct democracy who seek a more thoroughgoing muzzling of the process. But it does offer one path to finding a principled reason for limiting some of what direct democracy does. It is also a path that is justiciable and so can be applied without necessarily asking Congress to legislate or asking the Supreme Court to overturn precedent. It may, then, have some practical application and be a means by which some limitations on direct democracy maybe imposed.

Nevertheless, while this line of argument does open up some possibilities of ways in which we might be able to limit direct democracy, that does not mean we should limit the process.

Critics of direct democracy seem to share many of the Founding Fathers’ fears of majority rule. They rely on a model of democracy that is inescapably elitist. This may well be a normative model that is consistent with American constitutional practice, but that does not mean it is without flaw. Writing in 1966, Walker criticized academic scholars of the time for being wedded to a particular version of democracy and democratic institutions that emphasize attributes of the system, and value system maintenance, often at the cost of undervaluing such attributes as social movements.<sup>103</sup> Consistent with the anti-majoritarian fears of the Founders, social movements are often seen as manifestations of political extremism and are often seen as threats to the system.<sup>104</sup> For Walker, the social movements were those relating to race relations,<sup>105</sup> but in the modern period we may have our rough equivalents in the Tea Party and the Occupy movements. Far from fearing such movements, Walker sees movements like these as authentic expressions of popular will that provide valuable information about where the

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103. Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 293 (1966) (“The primary concerns of the elitist theorists have been the maintenance of democratic stability, the preservation of democratic procedures, and the creation of machinery which would produce efficient administration and coherent public policies. With these goals in mind, social movements (if they have been studied at all) have usually been pictured as threats to democracy, as manifestations of ‘political extremism.’”).

104. *Id.* at 293.

105. *Id.* at 289–90.



political system should be going from the bottom up.<sup>106</sup> In contrast, elitist theories emphasize the top-down.<sup>107</sup>

Arguably, that same critique applies today. The initiative process is a realization of a non-elitist form of democratic governance and one that allows the expression of popular views. Views that—in part by constitutional design and in part by political practice—are not adequately or appropriately represented by elected officials. In fact, there are very few principled arguments in support of limiting or reducing the say of people in government. At the end of it all, the idea that we need to limit direct democracy implies limiting the role of citizens. Given that the sweep of constitutional and political history across the Western world since the seventeenth century has been to expand the role of citizens and the definition of citizenry, any attempt to say we have gone too far and need to step back and become *less* democratic is a tough position to argue. After all, asking the question of when it is OK to limit direct democracy really is a version of the broader question of when it is OK to limit democracy. We should think carefully before supporting limits on the popular voice.

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106. *Id.* at 290.

107. For Walker this robbed the idea of democracy of some of its importance. By emphasizing an elitist theory, “contemporary political scientists have stripped democracy of much of its radical *élan* and have diluted its utopian vision, thus rendering it inadequate as a guide to the future.” *Id.* at 295.